



Handbook on Counter-Terrorism Measures:

*What U.S. Nonprofits and Grantmakers
Need to Know*

A plain-language guide to Executive Order 13224, the Patriot Act, embargoes and sanctions, IRS rules, Treasury Department voluntary guidelines, and USAID requirements.

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PRELIMINARY NOTE

This Handbook depicts the state of the law with respect to counter-terrorism measures and U.S. nonprofits and grantmakers as of March 15, 2004. This is a fast-developing area of the law, and readers are advised to consult qualified legal counsel regarding possible subsequent changes or additional issues relevant to their particular situations.

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This Handbook is not intended by INDEPENDENT SECTOR, InterAction, the Council on Foundations, the Day, Berry & Howard Foundation or Day, Berry & Howard LLP as legal advice, and readers are advised to consult qualified legal counsel as to their particular situations.

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EXECUTIVE SUMMARY

Since September 11, 2001, U.S. nonprofits and grantmakers of all types have grown increasingly conscious of their responsibility to prevent their funding or activities from assisting terrorists. This Handbook describes in plain language the most critical counter-terrorism measures in effect as of March 15, 2004 of relevance to U.S. nonprofits and grantmakers.

Executive Order 13224

In response to the September 11th terrorist attacks, President Bush issued an extremely broad Executive Order that prohibits transactions with individuals and organizations deemed by the Executive Branch to be associated with terrorism and allows the government to freeze all assets controlled by or in the possession of these entities and those who support them. The Executive Branch has taken the position that it has the authority to freeze assets while it investigates whether an organization is associated with terrorism. The lists of individuals and organizations deemed to be associated with terrorism are constantly growing and changing; but the reach of the Executive Order is broader than those appearing on the lists, and also extends potentially to individuals and organizations who *could* be listed in the future because of associations with terrorists or acts of terrorism. However, it seems extremely unlikely that enforcement action would be taken against nonprofits and grantmakers for a transaction with an unlisted party, presuming there were not other circumstances surrounding the transaction that signaled caution. The Executive Order applies to all “U.S. persons,” including organizations and individuals regardless of where they (or their property) are located, and it extends to transactions and property within the United States, property that subsequently comes within the United States, or property that is in the possession of any person or entity located within the U.S. Prohibited types of transactions include financial support, in-kind support and even technical assistance. Humanitarian assistance is also covered, if it is rendered to persons associated with terrorists or acts of terrorism. Importantly, an organization can violate the Executive Order, and could consequently have its assets frozen (or face other unspecified enforcement action), even if it does not *know* it is providing support to parties associated with terrorism.

The Patriot Act and Related Laws

Prior to September 11, 2001, Federal law included criminal sanctions for persons who provide material or financial support for terrorism or for Foreign Terrorist Organizations. On October 26, 2001, President Bush signed the Patriot Act into law, which contains various measures directed at strengthening the Federal government’s ability to combat terrorism. As amended by the Patriot Act, Federal law now imposes significant fines and terms of imprisonment for any entity that provides material support or resources *knowing* or *intending* that they are to be used in terrorist acts or by Foreign Terrorist Organizations. “Material support” encompasses an exceptionally broad range of assistance, and would appear on its face clearly to include grants, microfinance services and many types of technical assistance – if the recipient engages in terrorist acts or is a Foreign Terrorist Organization. At the end of June 2002, the Federal criminal law was again supplemented, this time to criminalize the “financing of terrorism.” This new provision punishes an individual or organization who “willfully provides or collects funds

with the intention that such funds be used” to carry out acts of terrorism or who knowingly conceals the source of funds used to carry out terrorism or to support Foreign Terrorist Organizations. Finally, nonprofits and grantmakers must be concerned with potential civil liability should their grants or other types of assistance end up in the wrong hands, because the Patriot Act also provides private parties with a civil cause of action against those who provide material or financial support for terrorism.

Embargoes and Trade Sanctions

Embargoes and trade sanctions have been critical weapons in the government’s anti-terrorism arsenal since long before the September 11 attacks. Enforcement has increased, however, so that now even inadvertent violations in the charitable or humanitarian context are much less likely to be overlooked. Although specific provisions vary, embargoes are often broad enough to encompass grants to a nonprofit that provide for the transfer of goods, services or other resources to the embargoed country. Violators of U.S. embargoes are potentially subject to substantial civil and criminal penalties, unless the activities fall within an exemption, which commonly include narrowly defined humanitarian emergency relief activities and transactions relating to informational materials. Under certain circumstances, a license from the Treasury or Commerce Department may be required.

IRS Rules

The United States tax laws generally prohibit the diversion of charitable assets to any non-charitable purpose, including material or financial support of terrorism. A public charity or private foundation risks the revocation of its tax-exempt status when it violates this prohibition. In addition, in 2003 Congress amended the Tax Code to provide for the automatic, retroactive suspension of tax-exempt status for an organization designated as a terrorist organization under any of the relevant legal authority discussed in this Handbook. Although the non-diversion prohibition applies equally to the use of charitable assets within and outside the U.S., additional rules govern grantmaking and expenditures outside the U.S. These have not yet changed to provide any new measures aimed specifically at combating terrorism.

Treasury Guidelines – “Voluntary Best Practices”

The Voluntary Treasury Guidelines, which were issued by the Treasury Department to assist nonprofits and grantmakers in complying with the Executive Order and the Patriot Act, describe so-called “best practices” for the manner in which internationally active foundations and nonprofits are organized and run, and provide an outline of a proposed anti-terrorist financing compliance program for such organizations. The Voluntary Treasury Guidelines do not have the force of law, nor do they ensure that organizations that comply with them will be safe from asset blocking, loss of tax-exempt status or civil or criminal liability. However, they do provide insight into the government’s interpretation of the various legal rules discussed elsewhere in this Handbook, including its view that any support for terrorism, irrespective of the knowledge or intentions of the parties involved, may be subject to enforcement action. The Voluntary Treasury Guidelines consist of four sections, of which the fourth section, dealing with anti-terrorist financing procedures, has proved the most controversial and problematic. This section proposes that internationally active foundations and nonprofits attempt to implement compliance

programs similar to those that are already legally required of private financial institutions by various Federal laws. Many of the specific recommendations would have an organization conducting extensive due diligence concerning all organizations and individuals with which it transacts its affairs, including not just foreign grantee organizations and partners but also foreign vendors and financial institutions used in carrying out foreign grantmaking and programming.

Additional Requirements for Organizations Funded by USAID

The United States Agency for International Development has instituted certification requirements that apply to all USAID funding recipients to assure that USAID does not directly or indirectly support terrorist groups or individuals. USAID requires an applicant for funding to state that it has not provided, and will not provide, material support or resources to any individual or entity (or an agent) that it knows or has reason to know advocates, plans, sponsors, engages in, or has engaged in terrorist activity. The certification is an express term and condition of all USAID agreements for funding and violation of the certification requirement is grounds for unilateral termination of the agreement by USAID.

I. BACKGROUND AND OVERVIEW OF COUNTER-TERRORISM RULES

Since September 11, 2001, U.S. nonprofits and grantmakers of all types have grown increasingly conscious of their responsibility to prevent their funding or activities from assisting terrorists. Highly publicized cases involving a few nonprofit charitable organizations accused of direct assistance to foreign terrorist organizations and statements by some public officials about a perceived widespread use of charitable organizations to raise and channel funding for terrorism have contributed to a growing sense of concern. Public debate on the appropriate boundaries between security and liberty (and the urging of some to revisit measures already taken in the government's efforts to combat terrorism) have also served to heighten awareness among nonprofits and grantmakers that the environment for carrying out their activities has changed markedly.

But what, specifically, has changed? What types of organizations and what activities are affected? Is it only internationally active organizations that should be concerned, or are there real concerns for all organizations? Many U.S. nonprofits and grantmakers are unsure.

This Handbook explains in plain language the most critical counter-terrorism measures in effect as of March 15, 2004 of relevance to U.S. nonprofits and grantmakers. The aim is to clarify the various measures that pre-date September 11, 2001 and those that have been introduced since then, which measures have the force of law and which are merely advisory, what the possible ramifications might be for noncompliance and what we can learn from the emerging counter-terrorism court cases.

We address the following topics:

- We begin in Part II with Executive Order 13224, signed by the President within days of the September 11 attacks, which calls for *asset blocking* of organizations held to have provided material support for terrorism.
- In Part III we discuss relevant provisions of the USA Patriot Act and related legislation that create or enhance *criminal sanctions* for providing material support for terrorism and provide for possible *civil liability* for the organizations and individuals involved.
- Part IV explains how counter-terrorism-focused embargoes and trade sanctions work, what the consequences may be for organizations that violate them and what sorts of exceptions may be available.
- In Part V we outline the relevant IRS rules and explain how the diversion of charitable funds to support terrorism can result in the *revocation of tax-exempt status*.
- Part VI discusses the Treasury Department's "Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities," which do not have the force of law, but which provide insights into the law enforcement community's perspective on the other counter-terrorism measures discussed.
- Part VII addresses the counter-terrorism measures applicable to organizations that receive funding from the United States Agency for International Development to carry out their work, violation of which can result in *unilateral termination of the USAID agreement*, and possible other adverse consequences, depending on the specific circumstances.

Many of the counter-terrorism measures discussed predate the attacks of September 11; others specifically respond to those events. In both cases, however, the climate for enforcement has changed, meaning that inadvertent violations may be less likely to be overlooked. As awareness of these issues grows among nonprofits and grantmakers alike, nonprofits are already finding they need to demonstrate their understanding of counter-terrorism measures – both to the government and to their funders. We hope a better understanding of these measures will help all U.S. nonprofits and grantmakers carry out their important work in this changed environment.

A preliminary word is in order regarding a set of topics *not* covered by this Handbook – the specific steps that different organizations need to take in order to ensure compliance with the rules discussed. There are several reasons why these topics are not addressed here at this time:

- The Handbook covers a wide range of different types of legal measures employed to combat terrorism. Appropriate compliance measures must be tailored carefully to fit the different kinds of measures and the specific relevant activities of the U.S. nonprofit or grantmaker in question.
- These are collectively very fast-developing areas of the law, with new developments occurring more or less constantly. Any comprehensive attempt at compliance guidance at this time would therefore probably be quickly outdated.
- The audience for this Handbook is exceptionally broad, encompassing every different type of U.S. nonprofit charitable organization and every type of U.S. grantmaker, both those that are internationally active and those only active here in the U.S. There is no “one-size-fits-all” approach to compliance that will be appropriate to the situation of all such organizations. Each organization, once it has familiarized itself with the broad new landscape of counter-terrorism measures, should seek qualified compliance advice specific to its situation.
- Neither the organizations for which this Handbook is intended nor lawyers qualified to provide advice in these areas have reached consensus as to what specific subgroups of organizations should do to comply with each of the different bodies of rules discussed. Important work is underway, also, to seek guidance and clarification from various relevant governmental bodies – principally the Treasury Department – that will likely have a strong bearing on any general compliance advice that may ultimately be given, as will further court decisions interpreting the various legal issues discussed.

II. EXECUTIVE ORDER 13224

***Summary.** In response to the September 11th terrorist attacks, President Bush issued an extremely broad Executive Order that prohibits transactions with individuals and organizations deemed by the Executive Branch to be associated with terrorism and allows the government to freeze all assets controlled by or in the possession of these entities and those who support them. The Executive Branch has taken the position that it has the authority to freeze assets while it investigates whether an organization is associated with terrorism. The lists of individuals and organizations deemed to be associated with terrorism are constantly growing and changing; but the reach of the Executive Order is broader than those appearing on the lists, and also extends potentially to individuals and organizations who could be listed in the future because of*

associations with terrorists or acts of terrorism. However, it seems extremely unlikely that enforcement action would be taken against nonprofits and grantmakers for a transaction with an unlisted party, presuming there were not other circumstances surrounding the transaction that signaled caution. The Executive Order applies to all “U.S. persons,” including organizations and individuals regardless of where they (or their property) are located, and it extends to transactions and property within the United States, property that subsequently comes within the United States, or property that is in the possession of any person or entity located within the U.S. Prohibited types of transactions include financial support, in-kind support and even technical assistance. Humanitarian assistance is also covered, if it is rendered to persons associated with terrorists or acts of terrorism. Importantly, an organization can violate the Executive Order, and could consequently have its assets frozen (or face other unspecified enforcement action), even if it does not know it is providing support to parties associated with terrorism.

Background of Executive Order 13224. One of the Federal government’s first responses to the terrorist attacks of September 11, 2001 was President Bush’s signing of Executive Order 13224 entitled “Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism” (the “Executive Order”).¹ As its title suggests, the Executive Order’s general aim is to cut off resources to terrorists and terrorist organizations through asset blocking.

Essentially, the Executive Order prohibits transactions with individuals and organizations deemed by the Executive Branch to be associated with terrorism and blocks any assets controlled by or in the possession of such entities *and those who support them*. Although the restrictions of the Executive Order are certainly not limited to nonprofits and grantmakers, the Executive Order has potentially far-reaching significance for them.

What is the legal status of the Executive Order? The Executive Order is not a law *per se* but it carries the force of law in that it represents the President’s exercise of statutory authority granted by Congress under the International Emergency Economic Powers Act (“IEEPA”) and the National Emergencies Act.² In the case of Executive Order 13224, President Bush declared a national emergency on September 14, 2001, which he has continued in effect ever since.³

¹ Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001), *amended by* Exec. Order No. 13,258, 67 Fed. Reg. 44,751 (July 3, 2002) & Exec. Order No. 13,284, 68 Fed. Reg. 4,075 (Jan. 28, 2003) [hereinafter Exec. Order No. 13,224], *available at* <http://www.ustreas.gov/offices/eotffc/ofac/sanctions/t11ter.pdf>. Almost two years later, on June 6, 2003, pursuant to the authority granted to it by Section 7 of the Executive Order, the Office of Foreign Assets Control of the Treasury Department issued regulations to implement the Executive Order, entitled “Global Terrorism Sanctions Regulations.” Those regulations can be found at 31 C.F.R. Part 594 and additional commentary to those regulations can be found at 68 Fed. Reg. 34,196 (June 6, 2002), *available at* <http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2003/pdf/03-14251.pdf>.

² International Emergency Economic Powers Act, 50 U.S.C. §§1701-1707; National Emergencies Act, 50 U.S.C. §§ 1601-1651. IEEPA has been used previously in the counter-terrorism arena. For example, on January 23, 1995, President Clinton declared a national

What does the Executive Order do? The Executive Order freezes all property and interests in property of certain “persons” (both individuals and organizations) identified as terrorists, controlled by terrorists, supporters of terrorists or otherwise associated with terrorists. More importantly for the purposes of nonprofits and grantmakers, the Executive Order expressly prohibits donations to such individuals and organizations and all transactions involving property or property interests frozen under the Executive Order. For the purposes of this Handbook these individuals and organizations are identified as “Covered Persons.”

Covered Persons whose property and interests are automatically frozen are: (1) those specifically listed in the Annex to the Executive Order itself;⁴ (2) those determined by the Secretary of State “to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States”;⁵ and (3) those determined by the Secretary of the Treasury “to be owned or controlled by, or to act for or on behalf of” Covered Persons.⁶

emergency with respect to “grave acts of violence committed by foreign terrorists that disrupt the Middle East peace process” and invoked the authority of IEEPA. Exec. Order No.12,947, 60 Fed. Reg. 5,079 (Jan. 23, 1995). One year later, the Treasury Department promulgated the Terrorism Sanctions Regulations implementing this executive order, which block all property and interests of “specially designated terrorists,” and prohibit U.S. persons from dealing “in property or interests in property of a specially designated terrorist, including the making or receiving of any contribution of funds, goods, or services to or for the benefit of a specially designated terrorist.” 31 C.F.R. §§ 595.201, 595.204. The Terrorism Sanctions Regulations specifically address charitable contributions to specially designated terrorists: “[N]o charitable contribution or donation of funds, goods, services, or technology to relieve human suffering, such as food, clothing or medicine, may be made to or for the benefit of a specially designated terrorist.” 31 C.F.R. § 595.408(a). This regulation, however, does not extend to individuals and organizations who donate or contribute such items “without knowledge or reason to know that the donation or contribution is destined to or for the benefit of a specially designated terrorist.” 31 C.F.R. § 595.408(b). The Executive Order discussed in this Part of the Handbook is much broader in its reach than previous uses of the President’s authority under IEEPA, and in most, if not all, situations, it can be assumed to encompass the restrictions adopted earlier under IEEPA.

³ Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001); Continuation of the National Emergency with Respect to Certain Terrorist Attacks, 67 Fed. Reg. 58,317 (Sept. 13, 2002); Continuation of the National Emergency with Respect to Certain Terrorist Attacks, 68 Fed. Reg. 53,665 (Sept. 12, 2003).

⁴ Exec. Order No. 13,224 § 1(a); 31 C.F.R. § 594.201(a)(1).

⁵ Exec. Order No. 13,224 § 1(b); 31 C.F.R. § 594.201(a)(2).

⁶ Exec. Order No. 13,224 § 1(c); 31 C.F.R. § 594.201(a)(3).

In addition to the categories of Covered Persons identified above, the assets and interests of other parties who (1) “assist in, sponsor or provide financial, material or technological support for, or financial or other services to or in support of, such acts of terrorism or [Covered Persons]”⁷ or are (2) “otherwise associated with” Covered Persons⁸ can be frozen, or subjected to other actions deemed appropriate by the Secretary of the Treasury.⁹ The Executive Order does not explain or qualify the nature of the association between Covered Persons and “others associated with” them that could lead to asset blocking, or describe the other actions that might be available to the Secretary of the Treasury.

Where to look to identify known or suspected terrorists relevant under the Executive Order.

Several U.S. government agencies have created lists of known or suspected terrorists, as has the United Nations and the European Union. The most comprehensive of the U.S. lists, the Specially Designated Nationals list (the “SDN list”), is maintained by the Treasury Department’s Office of Foreign Assets Control (“OFAC”).¹⁰ As of the middle of March, 2004 the SDN list, including AKAs, contained over 1500 names identified as Specially Designated Global Terrorists (“SDGTs”); over 200 names of organizations and individuals identified as Specially Designated Terrorists (“SDTs”); and over 250 names of organizations identified as Foreign Terrorist Organizations (“FTOs”). (Without counting AKAs, the numbers are considerably smaller.) There is considerable overlap in these classifications: about half of the SDTs are also FTOs and all of the FTOs have been designated as SDGTs. As of March 1, 2004, the SDN list included four U.S. public charities: The Holy Land Foundation for Relief and Development, Richardson, Texas (SDT/SDGT), the Benevolence International Foundation, Oak Lawn, Illinois (SDGT), the Global Relief Foundation, Bridgeview, Illinois (SDGT) and the Al Haramain Islamic Foundation, Ashland, Oregon (assets blocked pending investigation).¹¹

In addition to the SDN list, the so-called Voluntary Treasury Guidelines, discussed in Part VI below, suggest that nonprofits and grantmakers look more broadly, including looking at the U.S. Government’s Terrorist Exclusion List maintained by the Department of Justice,¹² the list promulgated by the United Nations pursuant to U.N. Security Council Resolutions 1267 and 1390,¹³ the list promulgated by the European Union pursuant to EU Regulation 2580,¹⁴ and “any

⁷ Exec. Order No. 13,224 § 1(d)(i); 31 C.F.R. § 594.201(a)(4)(i).

⁸ Exec. Order No. 13,224 § 1(d)(ii); 31 C.F.R. § 594.201(a)(4)(ii).

⁹ Exec. Order No. 13,224 § 5; 31 C.F.R. § 594.201, note 1 to paragraph (a).

¹⁰ <http://www.ustreas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf>.

¹¹ Janne G. Gallagher, Vice President and General Counsel, Council on Foundations, *Grantmaking in an Age of Terrorism: Some Thoughts About Compliance Strategies*, Legal Dimensions of Int’l Grantmaking (forthcoming Spring 2004). The Internal Revenue Service has suspended the tax-exempt status of the first three of these organizations.

¹² <http://www.state.gov/s/ct/rls/fs/2002/15222.htm>.

¹³ <http://www.un.org/Docs/sc/committees/1267/pdflist.pdf>.

other official list available to the charity.”¹⁵ Reportedly, there is considerable overlap between the SDN list and those maintained by the United Nations and the European Union.

It is extremely important to note that these lists represent identified Covered Persons, but the reach of the Executive Order extends more broadly. Besides those specifically listed in a relevant list, Covered Persons also include, potentially, organizations and individuals not necessarily actually listed, but that nonetheless fall into the various definitions described above because of their relationship to a person or organization that is listed or may become listed.

What does “terrorism” mean, as used in the Executive Order? The Executive Order defines “terrorism” as “an activity that (1) involves a violent act or an act dangerous to human life, property, or infrastructure; and (2) appears to be intended (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage taking.”¹⁶

Is knowledge or intent required to violate the Executive Order? Unlike provisions of the Patriot Act (discussed in Part III below) and other international money-laundering prevention statutes, which provide for criminal penalties, the Executive Order does not have either a “knowledge” or an “intent” requirement. In other words, an organization can violate the Executive Order, and consequently have its assets frozen, even if it does not *know* it is providing support to Covered Persons or has otherwise become “associated with” a terrorist organization as defined in the Executive Order (let alone have an *intention* to support terrorism).

What types of transactions might trigger the restrictions of the Executive Order in the charitable or humanitarian context? The Executive Order is purposely broad in scope. All U.S. persons, including organizations and individuals, are subject to the Executive Order, including all U.S. citizens and permanent resident aliens, regardless of where they (or their property) are located, and foreign organizations with a U.S. presence.¹⁷ Prohibited transactions do not have to take place abroad and the restrictions apply to all property located within the

¹⁴ http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_340/l_34020031224en00630064.pdf.

¹⁵ U.S. Department of the Treasury, Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities 6 (2002) [hereinafter Voluntary Treasury Guidelines], available at <http://www.ustreas.gov/press/releases/docs/tocc.pdf>. The authors note that the difficulty in identifying and locating all the arguably relevant lists is one of the primary challenges facing nonprofits and grantmakers. We note, also, that there is a growing number of commercial “list checking” services, and some are specifically targeting nonprofits and grantmakers. A table identifying these can be found at <http://www.usig.org/TechnologyandCompliance.asp>.

¹⁶ Exec. Order No. 13,224 § 3(d); 31 C.F.R. § 594.311.

¹⁷ Exec. Order No. 13,224 § 3(c); 31 C.F.R. § 594.315.

United States, property that subsequently comes within the United States, or property that is in the possession of U.S. persons and any other person or entity located within the U.S.¹⁸

Prohibited types of transactions include financial support, in-kind support, material assistance and even technical assistance.¹⁹ The Executive Order does not define these concepts.²⁰ It is not clear, for example, the extent to which regranting by an intermediary organization could expose the original grantor to a risk of asset blocking. Similarly, the extent to which vendor relationships might be covered is also unclear at this time. However, the kinds of due diligence proposed under the so-called Voluntary Treasury Guidelines, discussed in Part VI below, suggest that the Executive Branch believes the Executive Order might extend both to associations through regranting and associations through vendors, at least in some situations.

Humanitarian donations, as defined in Section 203 of the IEEPA,²¹ including food, clothing and medicine, to Covered Persons are expressly included in the scope of prohibited transactions under the Executive Order on the grounds that they would “seriously impair [the President’s] ability to deal with the national emergency declared in [the Executive] Order.”²² Accordingly, humanitarian donations may generally be given to persons who are not Covered Persons,²³ but the practical infeasibility of confirming humanitarian assistance recipients are *not* Covered Persons may leave the assistance provider unwittingly exposed to asset freezing or other enforcement under the Executive Order.

¹⁸ Exec. Order No. 13,224 § 1; 31 C.F.R. § 594.201(a).

¹⁹ Exec. Order No. 13,224 § 1(d).

²⁰ The judicial interpretations of similar language in the Patriot Act do provide some limitations, as discussed in Part III below. These limitations, however, have yet to be interpreted by courts specifically with respect to asset blocking under the Executive Order. Also, the Treasury Department’s Global Terrorism Sanctions Regulations provide a long list of the types of property and property interests to which the prohibition extends. 31 C.F.R. § 594.309. However, this list is illustrative only and does not limit the language of the Executive Order. The regulations also provide an extremely broad definition of the term “transfer” to include “any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, convey, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property.” 31 C.F.R. § 594.312. Section 594.312 also provides an extensive list of covered transactions, including assignments, conveyances, contracts, gifts, sales, payments, appointment of agents, and the fulfillment of any condition. The regulation identifies other transactions as well, and specifically states that the list provided is not all-inclusive. 31 C.F.R. § 594.312.

²¹ 50 U.S.C. § 1702(b)(2).

²² Exec. Order No. 13,224 § 4.

²³ Of course, such donation might be restricted by other bodies of law, for example, embargoes or trade sanctions, as described in Part IV of this Handbook.

Will a grant or other support to an organization or individual that is not listed in any of the lists at the time of the transaction be the basis for asset blocking or other action under the Executive Order if the organization or individual is later added to a relevant list? Although the Executive Order could be interpreted to cover such a situation, it seems extremely unlikely that enforcement action would be taken presuming there were not other circumstances surrounding the transaction that signaled caution. Indeed, the names appearing on the SDN list strongly suggest that the government would not take action in such a situation, given the fact that some prominent organizations made well-publicized pre-listing grants to now-listed organizations without themselves being added to the list.²⁴ Ongoing programmatic involvements present a tougher problem, as the name of a long-time grantee or local partner could be added to a relevant list at any time. OFAC operates a list serve that provides an electronic notice each time the SDN list is altered. Information about joining the list serve is available at: <http://www.treas.gov/press/email/subscribe.html>.²⁵

What about funding an organization that might receive support from a Covered Person – Must donors also be checked? On its face, the Executive Order does not appear to extend in a general way to an organization's donors. In order to violate the Executive Order, an organization must either *provide* support to or be "otherwise associated" with a Covered Person or must violate the broad prohibition on transactions involving assets blocked under the Executive Order. This prohibition covers "any transaction or dealing by United States persons or within the United States in property or interests in property blocked pursuant to [the Executive Order]...including but not limited to the making *or receiving* of any contribution of funds, goods, or services" (emphasis added).²⁶ However, the subsection in question adds the additional apparent limitation that a contribution from a Covered Person must then be used "to or for the benefit of" Covered Persons in order to be prohibited. Nonetheless, there remains an argument that the "any transaction" language is so broad as to encompass even donations of blocked property that are used exclusively for legitimate purposes.

In any event, donor-advised assistance may present special problems that could lead to asset blocking. Nonprofits and grantmakers might, for example, unwittingly provide assistance to or associate with a Covered Person if they *receive* resources from a Covered Person and then, upon the donor's advice, use the resources in a manner that furthers the goals of a Covered Person.²⁷

²⁴ See, e.g., Edward Alden, *Top Companies Gave to Islamic Charity Linked to Al-Qaeda*, Fin. Times (London), Jan. 31, 2003, at 6. The authors are also unaware of other types of enforcement action being taken against these grantmakers.

²⁵ In order to receive regular updates to the SDN list, check the two OFAC boxes at the bottom of the page.

²⁶ Exec. Order No. 13,224 § 2(a); 31 C.F.R. § 594.204.

²⁷ Also, the Treasury Department's Global Terrorism Sanctions Regulations prohibit any transaction "that evades or avoids, has the purpose of evading or avoiding, or attempts to violate [these regulations]." 31 C.F.R. § 594.205.

What can we learn from Executive Order court cases to date? As of March 15, 2004, there have been three court cases regarding asset blocking of nonprofits under the Executive Order that have produced written opinions from judges. In *Holy Land Foundation for Relief and Development v. Ashcroft*,²⁸ *Benevolence International Foundation, Inc. v. Ashcroft*²⁹ and *Global Relief Foundation, Inc. v. O'Neill*,³⁰ the nonprofits challenged their designation or pending designation as providing assistance to terrorist organizations. In each case, the asset blocking was upheld.

The *Global Relief Foundation, Inc.* case provides some insight into the circumstances in which courts might find that a grantor-grantee relationship constitutes the basis for asset blocking in the future. In that case, a majority of the participating judges assumed without analysis that the foundation's alleged grants to Covered Persons provided a sufficient connection to justify asset blocking under the Executive Order. One of the participating judges, however, wrote a separate concurring opinion to suggest that in future cases a grantor-grantee relationship might be too attenuated to permit blocking of the grantor's assets, depending on the facts.³¹

As evidence of the broad reach of the Executive Order, since the enactment of the Patriot Act (discussed in Part III below), the Executive Branch has taken the position that the President, or his authorized subordinates, have authority under the Executive Order to freeze assets while they investigate whether an entity should become a Covered Person.³² Although there may be legal bases to challenge these preemptory freezes, the government has the practical option simply to designate the entity as a Covered Person and avoid judicial review.³³ Should the authorities later decide that the designation was improper, or if the designation is challenged in court, the Executive Branch can simply unfreeze the assets.³⁴ Further, the government does not have to provide any pre-freeze notice or an opportunity to respond to the freeze where this action "would

²⁸ *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003), *cert. denied*, 72 U.S.L.W. 3551 (2004).

²⁹ *Benevolence Int'l Found., Inc. v. Ashcroft*, 200 F. Supp. 2d 935 (N.D. Ill. 2002).

³⁰ *Global Relief Found., Inc., v. O'Neill*, 315 F.3d 748 (7th Cir.), *cert. denied*, 124 S.Ct. 531 (2003).

³¹ See *Global Relief Found.*, 315 F.3d at 755. However, Treasury Department's Global Terrorism Sanctions Regulations define "interest" as "an interest of any nature whatsoever, direct or indirect." 31 C.F.R. § 954.306.

³² See *Global Relief Found.*, 315 F.3d at 751 (citing 50 U.S.C. § 1702(a)(1)(B)).

³³ See *Global Relief Found.*, 315 F.3d at 750-51.

³⁴ See *Aaran Money Wire Serv., Inc. v. United States*, No. 02-CV-789, 2003 U.S. Dist. LEXIS 16190 (D. Minn. Aug. 21, 2003).

impinge upon the security and other foreign policy goals of the United States.”³⁵ The Executive Order itself states that “there need be no prior notice of a listing or determination” of terrorist status.³⁶

III. THE PATRIOT ACT AND RELATED LAWS

Summary. *Prior to September 11, 2001, Federal law included criminal sanctions for persons who provide material or financial support for terrorism or for Foreign Terrorist Organizations. On October 26, 2001, President Bush signed the Patriot Act into law, which contains various measures directed at strengthening the Federal government’s ability to combat terrorism. As amended by the Patriot Act, Federal law now imposes significant fines and terms of imprisonment for any entity that provides material support or resources knowing or intending that they are to be used in terrorist acts or by Foreign Terrorist Organizations. “Material support” encompasses an exceptionally broad range of assistance, and would appear on its face clearly to include grants, microfinance services and many types of technical assistance – if the recipient engages in terrorist acts or is a Foreign Terrorist Organization. At the end of June 2002, the Federal criminal law was again supplemented, this time to criminalize the “financing of terrorism.” This new provision punishes an individual or organization who “willfully provides or collects funds with the intention that such funds be used” to carry out acts of terrorism or who knowingly conceals the source of funds used to carry out terrorism or to support Foreign Terrorist Organizations. Finally, nonprofits and grantmakers must be concerned with potential civil liability should their grants or other types of assistance end up in the wrong hands, because the Patriot Act also provides private parties with a civil cause of action against those who provide material or financial support for terrorism.*

What is the Patriot Act and how does it relate to nonprofits and grantmakers? On October 26, 2001, approximately 6 weeks after the September 11 terrorist attacks, President Bush signed the USA PATRIOT Act³⁷ (the “Patriot Act” or the “Act”) into law. This expansive law contains an amalgam of measures directed at strengthening the Federal government’s ability to combat terrorism by, among other things, easing restrictions on the government’s ability to investigate suspected terrorists, encouraging or mandating information sharing among Federal law enforcement agencies and private industry, requiring financial institutions to take affirmative steps to identify and root out money laundering, and strengthening existing laws which prohibit the provision of material or financial support to terrorists and terrorist organizations.

While many of the provisions of the Patriot Act will not substantially affect the manner in which nonprofits and grantmakers conduct business, certain provisions – in particular, those expanding

³⁵ *Holy Land Found.*, 333 F.3d at 163 (quoting *Nat’l Council of Resistance of Iran v. Dept. of State*, 251 F.3d 192, 208 (D.C. Cir. 2001)).

³⁶ Exec. Order No. 13,224 § 10.

³⁷ “USA PATRIOT ACT” is an acronym which stands for Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

criminal liability and enhancing penalties for providing material or financial support for terrorism – are of immediate consequence to nonprofits and grantmakers. These provisions may be of particular concern to nonprofits and grantmakers that are involved with organizations abroad or are themselves conducting foreign activities, although the legal reach of these provisions is not limited to such organizations.

Nonprofits and grantmakers are not immune to potential legal liability because of the inherent charitable or humanitarian nature of their missions. In fact, Federal law enforcement authorities have voiced the view that international grantmakers and internationally active nonprofits may be particularly vulnerable to terrorist influence, precisely because their missions compel them to direct resources and activities to global “hotspots,” and because of the perception that their charitable or humanitarian status may shield them from regulatory scrutiny.³⁸ Thus, although there are no provisions of the Patriot Act specifically directed at nonprofits and grantmakers,³⁹ investigation and enforcement activities may be expected to focus particularly on such organizations.

What is “material support for terrorism”? Even prior to September 11, Federal law included criminal sanctions for persons who provide material or financial support for terrorism and for Foreign Terrorist Organizations (“FTOs”).⁴⁰ Following the 1995 bombing of the Murrah Federal Building in Oklahoma City, Congress passed the Antiterrorism and Effective Death Penalty Act (“AEDPA”). The AEDPA authorized the Secretary of State to designate an organization as an FTO.⁴¹ Under the AEDPA, “material support” is defined as “currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel transportation, and other physical assets, except medicine or religious materials.”⁴² This is an exceptionally broad range of assistance, and

³⁸ David Aufhauser, then the General Counsel of the Treasury Department, Remarks at the May meeting of the American Bar Association Tax Section in Washington, D.C. (May 9, 2003), *in* 41 Exempt Org. Tax Rev. 49 (2003) (expressing the view that charities are “ripe for the picking in the eyes of people who would like to visit violence throughout the world” in part because “there’s a presumption of legitimacy for a charity,” and they are dispersed throughout the “trouble spots of the world”).

³⁹ See the discussion of the Treasury Department’s Voluntary Anti-Terrorism Guidelines in Part VI below. Although the so-called Voluntary Treasury Guidelines do not have the force of law, they provide useful insight into the perspective of law enforcement officials involved in enforcing the Executive Order and the Patriot Act.

⁴⁰ 18 U.S.C. §§ 2339A and 2339B, respectively.

⁴¹ Antiterrorism and Effective Death Penalty Act of 1996 §302, 8 U.S.C. § 1189.

⁴² 18 U.S.C. §§2339A(b).

would appear on its face clearly to include grants, microfinance services and many types of technical assistance – if the recipient engages in terrorist acts or is an FTO.⁴³

What are the penalties for providing material support for terrorism? The AEDPA made it a crime for a person to provide “material support or resources” to a designated organization.⁴⁴ The Patriot Act supplements these existing provisions by enhancing criminal penalties and expanding jurisdiction over the crime of providing support for terrorism. As amended by the Patriot Act, Federal law now imposes fines and terms of imprisonment of up to 15 years for any entity that provides material support or resources *knowing* or *intending* that they are to be used in terrorist acts or by FTOs.⁴⁵ If the terrorism results in the death of any person, the maximum penalty is life in prison.⁴⁶

The crime of financing terrorism. At the end of June 2002, the relevant provisions of Federal criminal law were again supplemented, this time to criminalize the “financing of terrorism.”⁴⁷ This new provision, however, punishes only an individual or organization who “*willfully* provides or collects funds with the *intention* that such funds be used” to carry out acts of terrorism (emphasis added) or who knowingly conceals the source of funds used to carry out terrorism or to support FTOs.⁴⁸

What is a “willful,” “knowing” or “intentional” violation? For nonprofits and grantmakers, the worrisome issue raised by these criminal statutes is the possibility that – despite their best intentions – they might be found to have willfully, knowingly or intentionally provided material support or resources for terrorism.

In criminal cases, “willfulness” means to act with knowledge that one’s conduct is unlawful and with the intent to do something the law forbids.⁴⁹ An act done with “knowledge” generally is defined as “done voluntarily and intentionally, and not because of mistake or accident or other

⁴³ It remains to be seen whether courts will uphold a broad *application* of these definitions in specific cases. See, for example, *Humanitarian Law Project v. United States Dep’t. of Justice*, 352 F.3d 382 (9th Cir. 2003), in which the court held that the terms “personnel” and “training” as used in the definition of “material support” are unconstitutionally vague, as discussed further in this Part III below.

⁴⁴ 18 U.S.C. § 2339B; *see also Humanitarian Law Project*, 352 F.3d at 384-88.

⁴⁵ 18 U.S.C. §§ 2339A(a) and 2339B(a)(1).

⁴⁶ 18 U.S.C. §§ 2339A(a) and 2339B(a)(1).

⁴⁷ Terrorist Bombings Convention Implementation Act of 2002 § 202(a), 18 U.S.C. § 2339C.

⁴⁸ 18 U.S.C. §§ 2339C(a)(1) and 2339C(c).

⁴⁹ *United States v. Ratzlaf*, 510 U.S. 135, 149 (1994).

innocent reason.”⁵⁰ Clearly, most nonprofits and grantmakers lack the affirmative intention of supporting terrorism. However, whether a grantmaker can be claimed to have “known” that the support or resources it provided would end up in terrorist hands is a different question altogether. The reported court cases to date that look at the “knowledge” requirement are discussed further in this Part below.

It is important to note that the level of knowledge sufficient to bring criminal charges may also be found in circumstances in which an individual is aware of a high probability that a certain fact is true and consciously avoids confirming that fact. Thus, it is conceivable that a grantmaker or nonprofit could be held to have knowingly supported terrorism if, for example, it made a grant to (or partnered in the field with) a highly suspicious organization without first confirming whether or not the organization was an FTO.

As a general matter in criminal law, the quantum of knowledge or intention that could be ascribed to a defendant will vary according to the circumstances of the particular case. In common law legal systems such as we have under U.S. Federal law, if a statute itself does not elaborate on a matter such as the required level of knowledge or intent, courts interpreting the statute are entitled to add specifics as they decide the cases before them. Given the very small number of decided cases interpreting these terms in the case of nonprofits and grantmakers under the Patriot Act, it is difficult to predict generally how they may be interpreted in the future in the case of specific types of assistance that might ultimately find their way into the wrong hands. It stands to reason that the further a nonprofit or grantmaker stands from a diversion of funds or activities to support terrorism, and the greater the level of effort taken by the organization to assure its funding and activities are not diverted, the less likely it is that the organization will face a realistic risk of criminal liability. Unfortunately, however, little more of a general nature can be said on this subject until there is a greater volume of decided cases with analogous facts, as discussed further in this Part III below.

Where to look to identify known or suspected terrorists relevant under the Patriot Act. The U.S. government and other lists discussed in Part II with respect to the Executive Order are all equally important ways of identifying known or suspected terrorists for Patriot Act purposes.

Potential civil liability under the Patriot Act. Another concern for nonprofits and grantmakers is potential civil liability should their grants or other types of assistance end up in the wrong hands. Title 18 of the United States Code, as enhanced by the Patriot Act, also provides private parties with a specific civil cause of action against those who provide material support for terrorism.⁵¹ The relevant provision allows private plaintiffs who are successful to recover treble damages, as well as court costs and attorneys’ fees.⁵²

⁵⁰ See, e.g., *United States v. Johnson*, 116 F.3d 163, 166 n.3 (6th Cir. 1997); *United States v. Kosma*, 951 F.2d 549, 558 (3rd Cir. 1991).

⁵¹ 18 U.S.C. § 2333.

⁵² 18. U.S.C. § 2333(a).

Plaintiffs seeking civil relief for a violation of relevant criminal provisions are not required to await a criminal indictment or conviction against an entity before filing a civil complaint. Rather, they are legally entitled to bring such an action in Federal court as soon as they can allege the basic elements necessary to prove the civil harm. If a civil defendant *is* first convicted of a criminal violation, the defendant is not then permitted to deny the essential allegations of the criminal offense in a later civil action.⁵³

What can we learn from the Patriot Act court cases? The three cases discussed in Part II of this Handbook, *Holy Land Foundation for Relief and Development v. Ashcroft*,⁵⁴ *Benevolence International Foundation, Inc. v. Ashcroft*⁵⁵ and *Global Relief Foundation, Inc. v. O'Neill*,⁵⁶ all involve Patriot Act criminal actions in addition to the Executive Order asset blocking discussed in Part II. However, these cases have perhaps little to tell well-intentioned nonprofits and grantmakers who make an isolated grant or other expenditure that ends up in the wrong hands, as in these cases the government generally alleged substantial and sustained assistance to Covered Persons.⁵⁷

The cases that have considered what the government is required to prove in order to obtain a conviction under the provisions of Federal law that prohibit providing material support to a designated FTO have held that the government must prove that the defendant specifically *knew* the organization had been designated by the Secretary of State as an FTO, or at least knew of the organization's unlawful activities.⁵⁸ Moreover, the government must also prove that the defendant *knew* that he or she was furnishing "material support," that is, the government must show that the defendant knew that the support would further the illegal activities of the FTO.⁵⁹ In essence, the cases hold that the statutes in question *cannot* be violated inadvertently or by mistake; a person can be found guilty only if he or she provides material support to an organization actually *knowing* it is a designated FTO or if he or she *knew* of the organization's unlawful activities that caused it to be listed as an FTO. As the Ninth Circuit Court of Appeals noted, "[r]ead without a requirement that a defendant knew of the organization's designation or

⁵³ 18 U.S.C. §§ 2333(b), (c).

⁵⁴ *Holy Land Found.*, 333 F.3d 156.

⁵⁵ *Benevolence Int'l Found.*, 200 F. Supp. 2d 935.

⁵⁶ *Global Relief Found.*, 315 F.3d 748.

⁵⁷ In two of the three cases the government alleged substantial and sustained assistance to Covered Persons. *Holy Land Found.*, 333 F.3d at 160; *Benevolence Int'l Found.*, 200 F. Supp. 2d at 936. In the third case, the extent of the assistance is not discussed in the opinion. *Global Relief Found., Inc.*, 315 F. 3d 748.

⁵⁸ *Humanitarian Law Project*, 352 F.3d 382; *United States v. Al-Arian, et al.*, No. 8:03-CR-77-T-30TBM, 2004 WL 516571 (M.D. Fla., March 12, 2004).

⁵⁹ *U.S. v. Al-Arian*, 2004 WL at *12-13.

knew of the unlawful activities that caused it to be so designated, the statute could be used to punish moral innocents.”⁶⁰

In the realm of civil litigation, one Federal court has held that entities – specifically including charitable foundations – who fund international terrorist groups may be held civilly liable for aiding and abetting any terrorist acts that those groups perpetrate.⁶¹ Ultimately, the possibility of civil liability exposure could turn out to be more vexing for internationally active nonprofits and grantmakers than the specter of criminal prosecution. This is because civil plaintiffs may be in a position to make out the necessary bare *allegations* to support a civil complaint on little more than suspicions that they would then seek to establish through “discovery” – the practice of compulsory information gathering that unfolds after the filing of a facially valid complaint. However, thus far, there has not been a flood of such so-called “strike suits” brought on the basis of alleged Patriot Act violations.⁶²

IV. EMBARGOES AND TRADE SANCTIONS

Summary. *Embargoes and trade sanctions have been critical weapons in the government’s anti-terrorism arsenal since long before the September 11 attacks. Enforcement has increased, however, so that now even inadvertent violations in the charitable or humanitarian context are much less likely to be overlooked. Although specific provisions vary, embargoes are often broad enough to encompass grants to a nonprofit that provide for the transfer of goods, services or other resources to the embargoed country. Violators of U.S. embargoes are potentially subject to substantial civil and criminal penalties, unless the activities fall within an exemption, which commonly include narrowly defined humanitarian emergency relief activities and transactions relating to informational materials. Under certain circumstances, a license from the Treasury or Commerce Department may be required.*

What are embargoes and trade sanctions? Embargoes and trade sanctions are used to advance a wide range of U.S. foreign policy and national security objectives, including counter-terrorism objectives. Indeed, such measures have been critical weapons in the anti-terrorism arsenal since long before the September 11 attacks, although the enforcement climate has changed such that

⁶⁰ *Humanitarian Law Project*, 352 F.3d at 400.

⁶¹ *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002 (N.D. Ill. 2001), *aff’d* 291 F.3d 1000 (7th Cir. 2002).

⁶² However, since the terrorist attacks of September 11, a variety of plaintiffs have brought Patriot Act civil suits against a myriad of defendants related to Al Qaeda, including listed foundations and nonprofits. See, e.g., *Burnett v. Al Baraka Inv. and Dev. Corp.*, No. 1:03-CV-09849-RCC (S.D.N.Y. filed Dec. 11, 2003); *Ashton v. Al Qaeda Islamic*, No. 1:02-CV-06977-RCC (S.D.N.Y. filed Sept. 4, 2002). (Seven Saudi charities appear among one case’s 204 defendants. Jennifer Senior, *A Nation Unto Himself*, N.Y. Times, March 14, 2004, at 36. Also, at least two listed U.S. foundations whose assets have been blocked under the Executive Order, Benevolence International and Global Relief Foundation, are named defendants in these civil actions.)

now even inadvertent violations in the charitable or humanitarian context are much less likely to be overlooked.

Who administers embargoes and trade sanctions and how do they work? The Treasury Department’s Office of Foreign Assets Control (“OFAC”) is the primary administrator of U.S. embargoes, but some are administered by the Commerce Department’s Bureau of Industry and Security (“BIS”). The exact descriptions of prohibited activities vary – often quite substantially – from embargo to embargo. Complete embargoes generally capture transactions with the embargoed government, transactions with persons or entities anywhere in the world that are controlled by the embargoed government, and transactions with persons or entities located within the embargoed country. There are other embargoes that are based on a particular type of activity, such as diamond trading, rather than a particular country.⁶³ OFAC maintains a webpage titled “Sanctions Program and Country Summaries” that provides a useful overview. It is located at <http://www.treas.gov/offices/eotffc/ofac/sanctions/index.html>.

In the case of country-specific embargoes, the prohibitions are usually broad enough to encompass grants to a nonprofit organization (whether U.S. or foreign) that provide for the transfer of goods, services or other resources (including potentially humanitarian items such as food or medicine) to the embargoed country. Even if the organization is merely transferring funds within the United States to another U.S. entity, the transaction will often be captured by sections in the embargo regulations dealing with “facilitating” (or participating indirectly in) prohibited transactions.⁶⁴

What exceptions are available for charitable work in embargoed countries and regions? Violators of U.S. embargoes are subject to substantial civil and criminal penalties, but licenses or exemptions may be available that authorize humanitarian and other types of nonprofit activities. Two types of exemptions commonly available to nonprofits and grantmakers are humanitarian emergency relief activities such as the provision of “food, clothing, and medicine, intended to be used to relieve human suffering”⁶⁵ and transactions relating to informational materials including such items as “publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds, and other

⁶³ See, e.g., 31 C.F.R. pt. 592 (Rough Diamond Control Regulations).

⁶⁴ See, e.g., 31 C.F.R. § 537.202 (Burmese Sanctions Regulations); 31 C.F.R. § 538.206 (Sudanese Sanctions Regulations).

⁶⁵ 31 C.F.R. § 560.210(b) (Iranian Transactions Regulations); International Emergency Economic Powers Act, 50 U.S.C. § 1702(b)(2).

information and informational materials.”⁶⁶ In the absence of an explicit exemption, a specific license must generally be obtained, usually from either OFAC or BIS.⁶⁷

V. IRS RULES

Summary. *The United States tax laws generally prohibit the diversion of charitable assets to any non-charitable purpose, including material or financial support of terrorism. A public charity or private foundation risks the revocation of its tax-exempt status when it violates this prohibition. In addition, in 2003 Congress amended the Tax Code to provide for the automatic, retroactive suspension of tax-exempt status for an organization designated as a terrorist organization under any of the relevant legal authority discussed in this Handbook. Although the non-diversion prohibition applies equally to the use of charitable assets within and outside the U.S., additional rules govern grantmaking and expenditures outside the U.S. These have not yet changed to provide any new measures aimed specifically at combating terrorism.*

The general non-diversion prohibition. Provisions of the U.S. Tax Code, Treasury Regulations adopted thereunder, and various rulings of the U.S. Internal Revenue Service generally prohibit the diversion of charitable assets to any non-charitable purpose – which clearly includes material or financial support of terrorism.⁶⁸ The consequence of violating this non-diversion prohibition is not the imposition of criminal or civil penalties as it is with violations of the Executive Order, the Patriot Act or embargoes and trade sanctions. A public charity or private foundation (i.e., any kind of organization described in Section 501(c)(3) of the U.S. Tax Code) that violates the non-diversion prohibition risks the revocation of its tax-exempt status. This means that the organization would lose not only the basis for its revenue not being subject to Federal income tax, but also the basis for its supporters to take charitable income tax deductions for their contributions.⁶⁹ If the organization was recognized as a public charity, a private foundation grant to it would also no longer be treated as a “qualifying distribution”⁷⁰ and would be treated as a “taxable expenditure,”⁷¹ unless the foundation exercised “expenditure responsibility” over the grant,⁷² as explained below. In addition, in 2003 Congress adopted an amendment to Section

⁶⁶ 31 C.F.R. §§ 538.211(c), 538.306 (2003) (Sudan); 31 C.F.R. §§ 586.206(b), 586.309 (Federal Republic of Yugoslavia (Serbia & Montenegro) Kosovo Sanctions Regulations); *c.f.*, International Emergency Economic Powers Act, 50 U.S.C. § 1702(b)(3).

⁶⁷ *See, e.g.*, 31 C.F.R. § 538.521 (Sudanese Sanctions Regulations).

⁶⁸ I.R.C. § 501(c)(3); Treas. Reg. § 1.501(c)(3) - 1(c)(1); *c.f.* Rev. Rul. 68-489, 1968-2 C.B. 210.

⁶⁹ I.R.C. § 170(c)(2)(B).

⁷⁰ I.R.C. § 4942(g)(1)(A).

⁷¹ I.R.C. § 4945(d).

⁷² I.R.C. § 4945(d)(4)(B).

501(p) of the Tax Code, providing for the automatic, retroactive suspension of tax-exempt status for an organization designated as a terrorist organization under the Patriot Act or added to any of the relevant U.S. government terrorist watch lists discussed in Part II above with respect to the Executive Order.⁷³

Existing IRS rules governing foreign grantmaking and expenditures. Although the general non-diversion principle applies equally to uses of charitable assets within and outside the U.S., the risks of unintended diversions may be greater in the context of certain kinds of foreign grantmaking and expenditures. Existing Treasury Regulations and IRS rulings set forth additional rules that govern grantmaking and expenditures outside the U.S. by Section 501(c)(3) organizations. A comprehensive discussion of these rules goes far beyond the scope of this Handbook.⁷⁴ However, as the IRS has signaled the possibility of further rulemaking specifically regarding terrorism-related diversions of charitable assets in the international context,⁷⁵ as discussed below, a general overview of the existing rules is relevant here.

Private foundations generally face penalty excise taxes for grants made to a foreign organization unless the grantee is the legal equivalent of a U.S. public charity⁷⁶ or the foundation engages in detailed procedures with respect to the grant known as “exercising expenditure responsibility.”⁷⁷ Expenditure responsibility is essentially a set of monitoring and documentation procedures that a foundation undertakes to ensure that a grant will be used for its intended charitable purposes, including a pre-grant inquiry, a written grant agreement, segregation of the granted funds and reporting by both the grantor and grantee as to the use of the grant.⁷⁸ For public charities, these specific penalty excise tax rules do not apply, but both private foundations and public charities are governed by IRS rulings setting forth steps they should take to ensure that funding they receive from U.S. corporations and individuals for foreign expenditure will give rise to a charitable income tax deduction for their donors.⁷⁹ Generally speaking, these rules require the charitable organization to exercise discretion and control over the funds in question and not to accept funds that are legally earmarked for particular foreign recipients. The appropriate level

⁷³ Military Family Tax Relief Act of 2003 § 108, I.R.C. § 501(p).

⁷⁴ Many of these rules are explained in plain language in John A. Edie & Jane C. Nober, *Beyond Our Borders: A Guide to Making Grants Outside the U.S.* (3d ed. 2002), available from the Council on Foundations at <http://www.cof.org/publications/>.

⁷⁵ I.R.S. Ann. 2003-29, 2003-20 I.R.B. 928.

⁷⁶ Treas. Reg. § 53.4945-5(a)(5); Rev. Proc. 92-94, 1992-2 C.B. 507.

⁷⁷ I.R.C. § 4945(d)(4)(B); Treas. Reg. § 53.4945-5(b).

⁷⁸ See John A. Edie, *Expenditure Responsibility Step by Step* (3d ed. 2002), available from the Council on Foundations at <http://www.cof.org/publications/>.

⁷⁹ Rev. Rul. 63-252, 1963-2 C.B. 101; Rev. Rul. 66-79, 1966-1 C.B. 48; Rev. Rul. 68-489, 1968-2 C.B. 210.

and evidence of discretion and control will vary under the specific circumstances, but at a minimum the initial recipient of the funds must demonstrate an independent decision that the uses to which it puts the funds abroad further its own charitable purposes. Also, to avoid impermissible earmarking, the initial grantee should generally not be legally bound to pass the funding directly through to a particular recipient.⁸⁰ Further specific guidance applies to grants to individuals.⁸¹

New IRS Counter-Terrorism Measures? Internal Revenue Service Announcement 2003-29.

In May of 2003, the IRS issued a formal announcement requesting public comments on whether it should clarify the existing requirements that charitable organizations must meet with respect to international grantmaking and other international activities in order to enhance protection against the diversion of charitable assets to support terrorism and, if so, how.⁸² The announcement solicited comments on many specific topics, including procedures that internationally active organizations have implemented post-Sept. 11 to protect against inadvertent diversions to support terrorism, the adequacy of the existing IRS rules outlined above to prevent such diversions, and the usefulness of the Treasury Department's Voluntary Guidelines (discussed in Part VI below) to preclude diversion of charitable assets to the support of terrorism.

On behalf of the charitable organization community, INDEPENDENT SECTOR and InterAction submitted comments (with assistance from the Day, Berry & Howard Foundation and a consortium of other interested members of INDEPENDENT SECTOR and InterAction),⁸³ as did the Council on Foundations,⁸⁴ members of the Tax Exempt Organizations Committee of the American Bar Association⁸⁵ and many interested charitable organizations.⁸⁶ Although the IRS to

⁸⁰ Rev. Rul. 63-252; Rev. Rul. 66-79; Rev. Rul. 68-489.

⁸¹ Rev. Rul. 56-304, 1956-2 C.B. 306; I.R.C. § 4945(g); Treas. Reg. §53.4945-4. Specifically, these rules provide that organizations are not precluded from making distributions to individuals provided they are made on a charitable basis in furtherance of the organization's purposes. The organization should maintain adequate records relating to the identifying information of each recipient of aid; the amount of funds distributed to each; the purpose of the funds; the manner in which the recipient was selected; and the relationship, if any, between the recipient and the organization.

⁸² I.R.S. Ann. 2003-29, 2003-20 I.R.B. 928.

⁸³ InterAction & INDEPENDENT SECTOR, *Public Comment on "International Grantmaking and International Activities by Domestic 501(c)(3) Organizations"* (July 18, 2003), available at <http://www.independentsector.org/PDFs/IRScomments.pdf>.

⁸⁴ Council on Foundations, *Comments in Response to Announcement 2003-29* (Aug. 5, 2003), available at http://www.cof.org/files/Documents/Legal/COF_comments/ZIRSCommentsLetter8.05.03.pdf.

⁸⁵ American Bar Association, Committee on Exempt Organizations of the Section on Taxation, *Comments in Response to Internal Revenue Service Announcement 2003-29, 2003-20 I.R.B. 928 Regarding International Grant-making and International Activities by Domestic*

date has not specifically responded to the comments it received, it has included consideration of further rulemaking in this area in its publicly disseminated work plan for 2004.⁸⁷ Also, the IRS has recently announced the intention to publish a new publication on international grantmaking intended to provide charities with information on appropriate due diligence and internal financial safeguards to ensure their assets are used for charitable purposes.⁸⁸

VI. TREASURY GUIDELINES – “VOLUNTARY BEST PRACTICES”

Summary. *The Voluntary Treasury Guidelines, which were issued by the Treasury Department to assist nonprofits and grantmakers in complying with the Executive Order and the Patriot Act, describe so-called “best practices” for the manner in which internationally active foundations and nonprofits are organized and run, and provide an outline of a proposed anti-terrorist financing compliance program for such organizations. The Voluntary Treasury Guidelines do not have the force of law, nor do they ensure that organizations that comply with them will be safe from asset blocking, loss of tax-exempt status or civil or criminal liability. However, they do provide insight into the government’s interpretation of the various legal rules discussed elsewhere in this Handbook, including its view that any support for terrorism, irrespective of the knowledge or intentions of the parties involved, may be subject to enforcement action. The Voluntary Treasury Guidelines consist of four sections, of which the fourth section, dealing with anti-terrorist financing procedures, has proved the most controversial and problematic. This section proposes that internationally active foundations and nonprofits attempt to implement compliance programs similar to those that are already legally required of private financial institutions by various Federal laws. Many of the specific recommendations would have an organization conducting extensive due diligence concerning all organizations and individuals with which it transacts its affairs, including not just foreign grantee organizations and partners but also foreign vendors and financial institutions used in carrying out foreign grantmaking and programming.*

Where did the Voluntary Treasury Guidelines come from? On November 7, 2002, the Treasury Department issued a document entitled “U.S. Department of the Treasury Anti-Terrorism Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities” (the “Voluntary Treasury Guidelines”).⁸⁹ The Voluntary Treasury Guidelines were issued with a press release

501(c)(3) Organizations (July 18, 2003), available at <http://www.abanet.org/tax/pubpolicy/2003/030714exo.pdf>.

⁸⁶ A pervasive criticism throughout these comments was the need for a unified pan-agency list of all Covered Persons designated as terrorists and their supporters and associates.

⁸⁷ Internal Revenue Service, *FY 2004 Exempt Organization (EO) Implementing Guidelines* (Oct. 3, 2003), available at http://www.irs.gov/pub/irs-tege/eowrkpln_04.pdf.

⁸⁸ Fred Stokeld, *IRS Working on Pub to Help EOs Avoid Abusive Transactions*, *Official Says, Today’s Tax Notes*, March 12, 2004, available at LEXIS, 2004 TNT 49-8.

⁸⁹ Voluntary Treasury Guidelines, available at <http://www.ustreas.gov/press/releases/docs/tocc.pdf>.

explaining that they were intended to assist nonprofits and grantmakers – particularly Muslim organizations – concerned about the drop-off in donations after the September 11 attacks, and with running afoul of the Executive Order and Patriot Act prohibitions.⁹⁰ The Voluntary Treasury Guidelines describe so-called “best practices” for the manner in which internationally active foundations and nonprofits are organized and run, as well as provide an outline of a proposed anti-terrorist financing compliance program for such organizations.

What is the legal status of the Voluntary Treasury Guidelines? As the title of the document suggests, the Treasury Guidelines are voluntary; they do not have the force of law. Organizations subject to Treasury Department regulation are not obligated to organize, or re-organize themselves or even change the manner in which they conduct their activities to be in accordance with the Voluntary Treasury Guidelines. The Voluntary Treasury Guidelines were also expressly not intended to create a “safe harbor.”⁹¹ Even strict compliance with the Voluntary Treasury Guidelines will not immunize an organization from potential asset blocking, loss of tax-exempt status or civil or criminal liability for violating the growing panoply of legal provisions concerning support of terrorism discussed in Parts II through V of this Handbook. Rather, they present the Treasury Department’s suggested approach for organizations to use to reduce the chance: (a) that they unwittingly make problematic expenditures in the first place; or (b) that they will be found liable if they *do* do so unwittingly.⁹²

What do the Voluntary Treasury Guidelines tell us about the perspective of the law enforcement officials within the Treasury Department? The Voluntary Treasury Guidelines provide insight into how officials within the Treasury Department’s law enforcement arm view the responsibilities of the nonprofit sector in the new, post-9/11 environment. Simply put, this side of the Treasury Department wants to see the nonprofit sector enlisted directly in its efforts to combat terrorism, as it has already made strides in doing in a legally enforceable manner with the financial services industry. In these efforts, the government expects everyone to take affirmative steps to ensure that support is not given to terrorist activities. From the unapologetic perspective

⁹⁰ Press Release PO-3607, U.S. Department of the Treasury, *Response to Inquiries from Arab American and American Muslim Communities on Charitable Best Practices* (Nov. 7, 2002), available at <http://www.ustreas.gov/press/releases/po3607.htm>. By way of background, after September 11, 2001, the Treasury Department blocked the assets of three U.S.-based Islamic charities with alleged links to Al Qaeda and Hamas.

⁹¹ The preamble to the Guidelines states that:

Compliance with the [Voluntary Treasury Guidelines] should not be construed to preclude any criminal or civil sanctions by the Department of the Treasury or the Department of Justice against persons who provide material, financial, or technological support or resources to, or engage in prohibited transactions with, persons designated pursuant to [relevant counter-terrorism legislation].

⁹² As the press release notes, if a charity effectively implements and follows the Guidelines, “there will be a corresponding reduction in the likelihood of a blocking order against any such charity or donors who contribute . . . in good faith, absent knowledge or intent.”

of the Treasury Department's law enforcement officials, as evidenced by the Voluntary Treasury Guidelines and the press release that accompanied them, any support for terrorist activity has potential enforcement consequences, irrespective of the intentions of the parties involved.⁹³

Notwithstanding the potentially enormous additional administrative costs that compliance with the Voluntary Treasury Guidelines would entail, the view of the Treasury Department's law enforcement officers, implicit in the Voluntary Treasury Guidelines, is that life simply *is* more expensive and inconvenient as a result of the terrorist attacks, and everyone is expected to bear a share of the new costs of doing business. Moreover, since certain of the enforcement measures at the disposal of the Treasury Department (specifically asset blocking under the Executive Order, discussed in Part II, and revocation of tax-exempt status, discussed in Part V) do not require any showing of knowledge or intent by a nonprofit or grantmaker that ends up making a problematic expenditure, the Voluntary Treasury Guidelines might also be seen as a message to such organizations that enforcement action could be taken based solely on the fact the expenditure was made – and entirely without regard to the knowledge or intentions of the organizations in question.

What do the Voluntary Treasury Guidelines contain? The Voluntary Treasury Guidelines consist of four sections, entitled: (1) “governance”; (2) “disclosure and transparency in governance and finances”; (3) “financial practices and accountability”; and (4) “anti-terrorist financing procedures.” The first three sections outline principles of good governance which are largely already observed by well-run foundations and nonprofits, are included in various statements of standards recommended to nonprofits⁹⁴ and are frequently the subject of state law governing the structure and operation of nonprofit organizations. Thus, the first three sections do not present substantial new challenges. The fourth section, dealing with anti-terrorist financing procedures, has proved the most controversial and problematic.

A complete inventory of Section IV of the Voluntary Treasury Guidelines – and the many practical challenges that implementing its suggestions would present for various types of organizations – fall beyond the scope of this Handbook.⁹⁵ In summary, this Section of the

⁹³ The view of the Treasury Department is also informed by intelligence information, not publicly disclosed but cited by prominent officials within the Treasury Department, to the effect that international charities are the second principal source of money that underwrites terrorist activity. David Aufhauser, then the General Counsel of the Treasury Department, Remarks at the May meeting of the ABA Tax Section in Washington, D.C. (May 9, 2003), in 41 Exempt Organization Tax Review 49 (2003).

⁹⁴ InterAction, *Private Voluntary Organization (PVO) Standards*, available at <http://www.interaction.org/pvostandards/index.html>; BBB Wise Giving Alliance, *Standards for Charity Accountability* (2003), available at <http://www.give.org/standards/spring03standards.pdf>; BBB Wise Giving Alliance, *Standards for Charity Accountability: Implementation Guide* (2003), available at <http://www.give.org/standards/impguide03.pdf>.

⁹⁵ This topic is dealt with comprehensively elsewhere. On June 20, 2003, the Council on Foundations delivered comments on the Voluntary Treasury Guidelines to the Treasury

Voluntary Treasury Guidelines proposes that internationally active foundations and nonprofits attempt to implement compliance programs similar to those that are already required of private financial institutions by the Patriot Act and the Bank Secrecy Act.⁹⁶ Many of the specific recommendations relate to so-called “know your customer” initiatives that would have an organization conducting extensive due diligence concerning all organizations and individuals with which it transacts its affairs. The subjects suggested for due diligence investigation go beyond foreign grantee organizations and foreign local partner organizations (and their board, staff and other associates), and include also foreign vendors and financial institutions used in carrying out foreign grantmaking and programming. It is unclear from the Treasury Voluntary Guidelines how far the relevant law enforcement officials within the Treasury Department believe this due diligence ought prudently to extend to funds re-granted either by initial U.S. or foreign recipients or subsequent recipients of assistance from U.S. nonprofits and grantmakers.

VII. ADDITIONAL REQUIREMENTS FOR ORGANIZATIONS FUNDED BY THE UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT

Summary. *The United States Agency for International Development has instituted certification requirements that apply to all USAID funding recipients to assure that USAID does not directly or indirectly support terrorist groups or individuals. USAID requires an applicant for funding to state that it has not provided, and will not provide, material support or resources to any individual or entity (or an agent) that it knows or has reason to know advocates, plans, sponsors, engages in, or has engaged in terrorist activity. The certification is an express term and condition of all USAID agreements for funding and violation of the certification requirement is grounds for unilateral termination of the agreement by USAID.*

Background. Even before the September 11 attacks, the United States Agency for International Development (“USAID”), the Federal government agency that is the primary vehicle for extending U.S. government-funded assistance to countries recovering from disaster, trying to escape poverty and engaging in democratic reforms, had begun work on steps to prevent the diversion of its assistance to support terrorism. USAID works in close partnership with U.S. charitable organizations, indigenous organizations, universities, American businesses, international agencies, other governments, and other U.S. government agencies throughout the world, including in many areas widely viewed as terrorist “hotspots.” To assure that USAID does not directly or indirectly support terrorist groups or individuals, the agency instituted certification requirements that apply to all USAID funding recipients.⁹⁷

Department. Council on Foundations, *Comments on U.S. Department of the Treasury Antiterrorist Financing Guidelines Voluntary Best Practices for U.S.-Based Charities* (June 20, 2003), available at http://www.cof.org/files/Documents/Legal/Treasury_Comments_06.03.pdf. INDEPENDENT SECTOR and InterAction also commented on the Voluntary Treasury Guidelines in response to Internal Revenue Service Announcement 2003-29, discussed in Part V, above.

⁹⁶ Bank Secrecy Act of 1970, Pub. L. 91-508 (codified as amended at 31 U.S.C. §§ 5311-5355); USA PATRIOT ACT tit. III (codified as amended in scattered sections of 31 U.S.C. and 18 U.S.C.).

⁹⁷ The certification requirement applies to both U.S. and non-U.S. organizations.

The USAID Certification Requirements. USAID requires an applicant for funding to state that it has not provided, and will not provide, material support or resources to any individual or entity (or an agent) that it knows or has reason to know advocates, plans, sponsors, engages in, or has engaged in terrorist activity. Specifically, the relevant USAID Policy Directive mandates that before making an award to a non-governmental organization, the Agreement Officer must obtain a certification with language substantially as follows:

As a condition of entering into the referenced agreement, [name of organization] hereby certifies that it has not provided and will not provide material support or resources⁹⁸ to any individual or entity⁹⁹ that it knows, or has reason to know, is an individual or entity that advocates, plans, sponsors, engages in, or has engaged in terrorist activity,¹⁰⁰ including but not limited to the individuals and entities listed in the Annex to the Executive Order 13224 and other such individuals and entities that may be later designated by the United States under any of the following authorities: § 219 of the Immigration and Nationality Act, as amended (8 U.S.C. § 1189), the International Emergency Economic Powers Act (50 U.S.C. § 1701 et seq.), the National Emergencies Act (50 U.S.C. § 1601 et seq.), or § 212(a)(3)(B) of the Immigration and Nationality Act, as amended by the USA Patriot Act of 2001, Pub. L. 107-56 (October 26, 2001)(8 U.S.C. § 1182). [Name of organization] further certifies that it will not provide material support or resources to an individual or entity that it knows, or has reason to know, is acting as an agent for any individual or entity that advocates, plans, sponsors, engages in, or has engaged in, terrorist activity, or that has been so designated, or will immediately cease such support if an entity is so designated after the date of the referenced agreement.¹⁰¹

⁹⁸ “Material support and resources” includes currency or other financial securities, financial services, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine and religious materials.

⁹⁹ “Entity” is defined in the certification as “a partnership, association, corporation, or other organization, group, or subgroup.”

¹⁰⁰ “Engage in terrorist activity” is defined in section 212(a)(3)(B)(iv) of the Immigration and Nationality Act. 8 U.S.C. § 1182(a)(3)(B)(iv). The definition includes a person who, in an individual capacity or as a member of an organization, commits or incites other to commit, under circumstances indicating an intent to cause death or serious bodily injury to another, a terrorist act, or one who plans a terrorist activity, gathers information for potential targets for terrorist activities, or one who solicits money or other persons for a terrorist activity or terrorist organization, or one who provides material support (including funds, a safe house, transportation, communications, false documentation, weapons) for a terrorist act.

¹⁰¹ Implementation of E.O. 13224 – Certification Regarding Terrorist Financing, USAID Acquisition and Assistance Policy Directive (AAPD) 02-19 (Dec. 31, 2002) (footnotes added), available at http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd02_19.pdf. It

Violation of the USAID Certification Requirements. According to the Policy Directive, the certification is an express term and condition of all USAID agreements for funding and violation of the certification requirement “shall be grounds for unilateral termination of the agreement by USAID prior to the end of its term.” Moreover, because the Policy Directive requires the Agreement Officer to obtain a certification “substantially as follows,” different offices of USAID may, in individual circumstances, require variations of this language and provide for other types of consequences.¹⁰²

VIII. CONCLUSION

In the post-September 11th world, nonprofits and grantmakers must be aware that the landscape for carrying out their activities has changed importantly. From the government's perspective, the onus is on nonprofits and grantmakers to understand the counter-terrorism measures in effect and to take affirmative steps to ensure that support does not end up in the hands of terrorists. The authors hope that this plain language Handbook will assist the nonprofit and grantmaking community in understanding these measures and new operating environment in which we now find ourselves.

should be noted that all of the cited definitions, as well as the violation language described below are part of the certification language required by AAPD 02-19.

¹⁰² For example, according to an article entitled “Deterring Donors: Anti-Terrorist Financing Rules and American Philanthropy,” by Barnett F. Baron, USAID has suggested language requiring a return by the grantee of all funds advanced for a violation of the certification requirements. Barnett. F. Baron, *Deterring Donors: Anti-Terrorist Financing Rules and American Philanthropy*, Int’l J. of Not-For-Profit Law, Jan. 2004, at 25 available at http://www.icnl.org/journal/vol6iss2/ar_baron.htm.